UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8

ACE HEATING & AIR CONDITIONING CO., INC.		
and	**CASES**	**08-CA-133965** **08-CA-133967** **08-CA-133968**
SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 33		
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ACE HEATING & AIR CONDITIONING CO., INC.		
Employer		
and	**CASE**	**08-RC-127213**
SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 33		
Petitioner		

BRIEF OF COUNSEL FOR THE GENERAL COUNSEL TO
ADMINISTRATIVE LAW JUDGE ARTHUR AMCHAN

Counsel for the General Counsel respectfully files this brief with the Honorable Arthur Amchan, Administrative Law Judge. This matter was heard in Cleveland, Ohio on December 8 and 9, 2014. Counsel for the General Counsel will set forth the operative facts and legal theories upon which it relies upon to sustain the allegations contained in the Complaint.[1]

This matter comes before Judge Amchan (ALJ) based upon a Consolidated Complaint that issued on September 30, 2014,[2] amended on October 27 and on November 18, alleging that Respondent violated Section 8(a)(1) by its threats, interrogation, offers of money for votes, and

[1] In this Brief, Ace Heating and Air Conditioning Co., Inc. will be referred to as Respondent and Sheet Metal
[2] Unless otherwise noted, all dates are in 2014.

coercive statements regarding denial of wage increases. (G.C. Ex. 1(k), 1(n) and 1(q)) On January 13, 2015, Counsel for the General Counsel filed a Motion to Amend Complaint to include an allegation that Respondent granted wage increases to its employees to restrain or coerce employees' union activities in violation of Section 8(a)(1).

This complaint consolidates the unfair labor charge allegations with the Union's Objections in Case 08-RC-127213 asserting that the Respondent's conduct during the critical period destroyed the laboratory conditions, thus affecting the results of the election. (G.C. Ex, 2(a) and 2(f)) The Complaint also asserts that Respondent's unfair labor practice violations during the critical period are so serious and substantial and requests that, as a remedy, Respondent be ordered to recognize and bargain with the Union on the basis of the Union's majority card support because traditional Board remedies will be unable to erase the irreparable impact of Respondent's conduct to enable the Board to conduct a fair re-run election.

I. ISSUES PRESENTED

1. Whether Respondent violated Section 8(a)(1) by threatening employees with job loss and with plant closure during the critical period of the union election?
2. Whether Respondent violated Section 8(a)(1) by promising benefits to employees in the form of attempted bribes for voting against the Union?
3. Whether Respondent violated Section 8(a)(1) by interrogating an employee about his voting intentions?
4. Whether Respondent violated Section 8(a)(1) of the Act by coercively informing an employee that scheduled wage increases were withheld because the Union filed Objections to the election?

5. Whether Respondent violated Section 8(a)(1) when it granted pay increases to employees while the Union's objections to the election are pending?
6. Whether, based upon the Respondent's commission of hallmark unfair labor practice violations, the Union's majority of support on authorization cards and its demand for voluntary recognition, Respondent should be ordered to recognize and bargain with the Union?

II. CREDIBLITY

Counsel for the General Counsel submits that its witnesses should be credited where a conflict exists between the testimony of General Counsel's witnesses and Respondent's witnesses. General Counsel's witnesses testified in an honest and straightforward manner on direct and cross-examination, providing credible detail of events and conversations. Many of these witnesses are current employees who testified adversely to the Respondent, in the presence of Respondent's highest ranking official, Mitchell Stephen (Stephen). In contrast, Respondent's witnesses were vague, unreliable and should not be credited.

Specifically, supervisor Ed Dudek's testimony was clear and honest with regard to the threats of plant closure and job loss, Stephen's attempted bribery, and his own part in what is an unlawful interrogation. While Respondent attempts to show that Dudek was a pro-union supervisor and on that basis, should not be credited, Dudek, a statutory supervisor with negligible protections under the Act, had nothing to gain by telling Respondent's employees about Stephen's threats of plant closure, threats of employee job loss, and Stephen's promises of monetary benefits for voting against the Union. Notably, at the time of hearing, Dudek had voluntarily resigned his employment and has no pecuniary stake in this matter. Dudek testified sincerely with regard to the authority he was conferred by Stephen in communicating to

employees Stephen's threats and attempted bribery. Further, as Stephen described Dudek as his "best friend," "business partner," and "confidant," Dudek's testimony, in the presence of Stephen, came at great personal risk. (Tr. 328, 344, 387)

Dudek's testimony about Stephen's threats was corroborated in detail by current employees, Christopher Sikora, Noble Hall, as well as former employees Brian Orosz and Henry Huckoby. The testimony of current employees is entitled to considerable weight. *See*, *e.g.,* Cal-Maine Farms, 307 NLRB 450 (1999). None of these employees nor current employee James Mazzeo, who testified to Respondent's unlawful bribery and the denial of scheduled wage increases, have any direct financial stake in the outcome of this proceeding. The Board has credited the testimony of individuals employed by the employer who are not discriminatees and have no direct financial interest in the outcome of the case. *See, e.g.,* Stanford Realty Associates, 306 NLRB 1061, 1064 (1992); Molded Acoustical Products, 280 NLRB 1394, 1398 (1986). The testimony of General Counsel's employee-witnesses is reliable and should be credited.

In contrast, Stephen's recollection of his conversations with Dudek, was imprecise and unclear. During the week that the Union filed its petition for election, Stephen testified that he had several conversations with Dudek about the union campaign. Yet Stephen admitted, other than one conversation, he could not recall any of the specific details of those conversations with Dudek. (Tr. 387-388) Stephen could not recall any other conversations that he had with Dudek during the critical period. (Tr. 391) Stephen could not recall the date or even meeting with the Union representatives when the Union demanded voluntary recognition. (Tr. 368) In this regard, Stephen's testimony was vague, self-serving and unreliable. Counsel for the General Counsel submits that Stephen's testimony should not be credited.

Respondent's witness, employee Steve Sarosy testified in sharp contrast to every other employee witness, particularly about the Union's solicitation of authorization cards. At hearing, Sarosy incredibly testified that on April 21 at 9:30 am at a group meeting at the job site, Dudek handed out authorization cards and told employees to sign the cards. (Tr. 438, 469-470). After being shown text messages while on cross-examination, Sarosy conceded that he was not at the job site on that morning. Sarosy's testimony about Dudek soliciting cards at the job site is unreliable and he should not be credited. (Tr. 475-483)

III. EVIDENCE & LEGAL ARGUMENT

A. UNION'S MAJORITY STATUS, DEMAND FOR RECOGNITION AND PROCEDURAL HISTORY

The Respondent operates a heating and air conditioning business in Cleveland, Ohio performing installations and service. (Tr. 348-49) In April and May 2014, Respondent employed eight employees. (Tr. 348) Seven of the employees worked in the installation division, while Charles Ashton was the only service technician. (Tr. 349) Dudek supervised the installation employees, who reported daily to an assigned job site. (Tr. 349) In April and May, Dudek supervised all of the installers at the Shoreway Lofts job site, a commercial conversion of a warehouse to apartments on the near west side of Cleveland, Ohio. (Tr. 81-82) Vice President and part owner of Respondent, Mitchell Stephen directly supervised Dudek. (Tr. 78) Stephen admits that he is a high ranking official for the Respondent and is viewed that way by his employees. (Tr. 82, 155, 167, 235, 267, 296, 353) In April and May, Stephens visited the Shoreway Lofts jobsite on limited occasions, generally communicating his instructions to employees through Dudek. (Tr. 269, 298)

On April 21, Union organizer David Coleman and Union business agent Kevin Tolley solicited and obtained seven authorization cards. (Tr. 36) Coleman solicited and received six

authorizations cards from employees at a pre-work meeting at the Shoreway Lofts jobsite. (Tr. 28-31) While Dudek was present during this meeting, Coleman conducted the meeting and directly solicited cards from the six installers. (Tr. 25-26, 32; GC Ex 3(A)-(C), 3(E)-(G)) Dudek neither directed nor solicited employees to sign authorization cards. (Tr. 86) Later that morning, Coleman and Tolley solicited and received a signed card from installer Steve Sarosy at Gus's restaurant. (Tr. 33; GC Ex. 3(H)) When Coleman solicited the authorization cards, he explained to the employees that by signing the cards, they authorize the Union to represent them for collective-bargaining purposes for terms and conditions of their employment with the Respondent. (Tr. 25, 33)

In the afternoon of April 21, Coleman and Tolley visited Stephen at Respondent's shop. During this meeting, Coleman presented Stephen with a letter demanding voluntary recognition based upon the Union's majority of card support from Respondent's employees. (Tr. 38, GC Ex. 4) Coleman told Stephen he would give him a few days to respond to the Union's request for recognition. (Tr. 38) Stephen did not respond to the Union's demand for recognition. (Tr. 42)

On April 24, the Union filed a petition for election in Case 08-RC-127213. (Tr. 42; GC Ex. 2(a)) A Stipulated Election Agreement was approved on May 8 and a Board-conducted election took place on May 21, among the employees in the following unit.

> All full time field installers and service technicians employed at the Employer's facility located at 1500 Brookpark Road, Cleveland, Ohio, but excluding all sales staff, office clerical employees, professional employees, guards and supervisors as defined by the National Labor Relations Act. (GC Ex. 2(i))

The tally of ballots from this election showed the following results:

Approximate number of eligible voters…….....8
Void ballots……...……..... 0
Votes cast for the Petitioner……...….4

Votes cast against the Petitioner…… ……...4
Valid votes counted……..8
Challenged ballots……1
Valid votes counted plus challenged ballots……9
(GC Ex. 2(i))

On May 27, the Union filed a challenge to Dudek's ballot, and objections to the conduct affecting the results of the election. (GC Ex. 2(f)) On May 29, the Regional Director of Region 8 directed a hearing on the challenged ballot of Dudek to determine his eligibility to vote. (Ex. 2(g)) Pursuant to a Hearing Officer's Report and Recommendation, Dudek was found to be a statutory supervisor, the challenge to this ballot was sustained and Dudek's ballot was unopened. (Ex. 2(i)) On August 14, the Board adopted the hearing officer's findings and recommendation that Dudek is a statutory supervisor, and remanded the petition to the Region for determination on the pending objections. (GC. Ex. 2(k))

B. THREATS OF PLANT CLOSURE AND JOB LOSS (COMPLAINT PARAGRAPH NO. 9 /OBJECTION NO. 1)

On April 23, after the Union demanded recognition from Stephen, Dudek and Stephen had a telephone conversation. (Tr. 87, 324-325) Stephen took Dudek's call at home within the hearing of his wife, Respondent's President Laura Stephen. (Tr. 419) During this conversation, Stephen asked Dudek which employees signed authorization cards. (Tr. 87) Dudek responded that everyone signed cards. (Tr. 88) Stephen instructed Dudek to "tell the guys if they wanted to take union jobs, take union jobs and leave him out of it." (Tr. 88) Laura Stephen corroborated that her husband told Dudek that if all the employees signed authorization cards, "why don't they go and get union jobs." (Tr. 422, 429-30) In the morning of April 24, Dudek met with employees at the job box at the Shoreway Lofts project. (Tr. 89) Dudek told the employees, "Mitch told me to tell you if you wanted union jobs, take union jobs. Leave him out of it." (Tr. 90) Installers Noble Hall, Chris Sikora, Steve Sarosy, Brian Orosz, Henry Huckoby and James

Mazzeo were present at the job box and heard Dudek repeat Stephen's threat that employees should quit their employment if they wanted to join the Union. (Tr. 89-90)

Dudek had at least five conversations about the Union with Stephen during the critical period preceding the election. (Tr. 91) These conversations, both in person and by phone took place in the shop and on jobsites. (Tr. 91) Stephen repeatedly told Dudek that "he would shut the doors if they (the employees) voted in the Union." (Tr. 91) Stephen directed Dudek to tell employees about his threat to close the business. (Tr. 92) On multiple occasions during the critical period, Dudek complied with Stephen's directive and told employees that if they voted for the Union, "Mitch" would shut the place down." (Tr. 92) Prefacing his comments to employees with "Mitch told me to tell you," Dudek repeatedly threatened employees that the operations would close if they selected the Union and that employees would be out of a job. (Tr. 92-93) Dudek made these threats at the beginning of the workday and when he distributed employees' paychecks. (Tr. 92) Dudek testified that more than five of the employees that he worked with knew that Stephen asked him to relay these threats of closure. (Tr. 93)

At hearing, four current employees corroborated Respondent's threats of closure and job loss. Employees Henry Huckoby, Chris Sikora, Brian Orosz and Nobil Hall testified that about a week before the union election, on a Wednesday while Dudek passed out paychecks, Dudek told the employees that Mitch told him to tell the employees that if they voted in the Union, Stephen would close the business and that they would lose their jobs. (Tr. 154, 241-242, 276, 304) Sikora testified that Dudek told employees on a payroll Wednesday about one or two weeks before the union election, that Dudek, "didn't want to tell us, but it was coming from Mitch, that if I voted for the Union, I would lose my job." (Tr. 276)

Respondent violated Section 8(a)(1) when Dudek, as directed by Stephen, threatened employees with plant closure and with job loss. Established Board precedent instructs that predictions of the effects of unionization, particularly with plant closure and job loss, must be based on objective facts without any implication that an employer may or may not take action solely on its own initiative for reasons unrelated to economic necessities and known by it. NLRB v. Gissel Packing Co., 395 US 575, 618 (1969). Here, Respondent presented no evidence that its threats of plant closure were based upon any objective facts. In Dlbak Corp. 307 NLRB 1138 (1992), the Board held that statements about plant closure and loss of jobs made without any rational basis are unlawful. Unsubstantiated predictions that a plant shutdown will result from a union victory are unlawfully coercive and violate Section 8(a)(1). Federated Logistics & Operations, 340 NLRB 255, 256 (2003). Further, telling employees that they should quit violates 8(a)(1) as it is an implicit threat that unionization is incompatible with continued employment, and that union supporters will be discharged. Oxburn-Hessy Logisitics, 359 NLRB No. 109, *slip. op.* at 2 (May 2, 2013).

Additionally, Respondent's threats of plant closure and job loss are objectionable conduct. A violation of Section 8(a)(1) occurring during the critical period interferes with the results of the election unless it is so de minimis that it is "virtually impossible" to conclude that the violation could have affected the results of the election. Midsouth Drywall Co. Inc., 339 NLRB 480, 481 (2003).

Any argument that Respondent's conduct here is so de minimis to have affected the results of the election cannot be sustained. Repeated threats of plant closure and job loss are "among the most flagrant" violations of the Act and "have lingering effects" that cannot "be readily dispelled. NLRB v. Gissel Packing Co., 395 US 575, 618 (1969); *see, e.g.,* Evergreen

America Corp., 348 NLRB 178, 180 (2006); El Rancho Market, 235 NLRB 468, 478 (1978); Broyhill Co., 260 NLRB 1366 (1982). The Board has long held that these types of threats have an irreparable and coercive effect upon employees' freedom of choice in the election of a collective bargaining representative. Hedstrom Co., 235 NLRB 1193, 1195 (1978) Here, the uncontroverted evidence shows that Respondent's employees were exposed to the threats of plant closure and job loss throughout the critical period.

Respondent contends that even if Dudek made these threats to employees, he lacked authority from Stephens to convey these statements. At the outset, the record fails to support this claim as it is clear from the testimony that Stephen expressly and explicitly authorized and directed Dudek to communicate threats of closure and job loss to employees. (Tr. 88, 91-92)

Assuming arguendo that Dudek's threats to employees were unauthorized by the Respondent and purportedly contrary to the instructions that were given to him, this argument carries no weight and is contrary to Board law. Specific instructions to supervisory employees not to make threatening or coercive statements do not relieve an employer from imputed liability for statements made by supervisors unless the instructions are also communicated to employees. NLRB v. Ace Comb Co., 342 F. 2d 841, 843 (7th Cir. 1965); Jay Foods, 223 NLRB 423 (1977), *enf'd. on this point*, 573 F 2d 438, 445 (7th Cir. 1978). As explained in Ace Comb, *supra.* at 843 "having clothed the supervisors with the employer's authority, the statements will naturally have a coercive effect, regardless of whether they are unauthorized." Respondent presented no evidence to show that its employees were told that Dudek's statements could not be relied upon, that Respondent repudiated these threats to employees, or that Dudek lacked the authority to express statements of plant closure or job loss to employees.

The Board imputes liability to employers for coercive remarks by statutory supervisors, without further inquiry into their agency status. *See, e.g.,* Arlington Electric, Inc., 332 NLRB 845, 851 (2000); Storer Communications, 294 NLRB 1056, 1077 (1989). This bright line principle applies even in situations, as here, where supervisor Dudek engaged in some union activity. Maidville Coal Co, 257 NLRB 1106, 1122-1223 (1981); Daniels Construction Co., 241 NLRB 336, 340 (1979) Notwithstanding Respondent's claims that Dudek's conduct was unauthorized, Respondent still bears the liability for its supervisor's actions.

Respondent further asserts that it is not liable for Dudek's threats of discharge and plant closure because he was a pro-union supervisor acting out of his own interest and sympathies. *See*, Paintsville Hospital Co., 278 NLRB 724 (1986). This argument also fails. In each instance that Dudek unlawfully threatened employees with job loss and closure, he prefaced his remarks to employees that the threats came from Stephen and did not originate from him. In C&T Manufacturing, 233 NLRB 1430 (1977), the Board noted,

> Threats from a so-called first line supervisor, accompanied by the use of names of the company officials…are as coercive upon the employees as if made by the company officials themselves, since they are perforce considered to be authoritative by the employees and taken to be spoken directly for higher management.

Regardless of Respondent's contention that Dudek was sympathetic to the Union, the evidence unambiguously demonstrates that all of the threats to employees were attributable and directly attributed to Stephen.

Counsel for the General Counsel urges the ALJ to sustain Objection No. 1 and to conclude that Respondent violated Section 8(a)(1) by threatening employees with job loss and plant closure during the critical period preceding the union election.

C. PROMISE OF BENEFITS TO EMPLOYEES IN THE FORM OF ATTEMPTED BRIBES TO VOTE AGAINST THE UNION (COMPLAINT PARAGRAPH NO. 10/OBJECTION NO. 3)

Between April 22 and April 24, installer James Mazzeo worked on a jobsite with Dudek. (Tr. 171) Dudek recounted to Mazzeo that Stephen told him the prior evening that there was no way he was going to go Union and that "he (Stephen) said he would pay the employees for their vote." (Tr. 172-174) Mazzeo testified that Dudek repeated that Stephen would give employees $1,000 to $10,000 in exchange for their vote. (Tr. 174)

About a week before the union election, Stephen repeated to Dudek that he would buy employee votes. Stephens directed Dudek to tell employees that he would pay employees $1000 to $10,000 for a no vote. Dudek told Stephens that he would not convey the bribe to employees. (Tr. 96) After hearing Stephen's instructions the week prior to the election, Dudek did not tell any employees about Stephen's monetary offer during the critical period. (Tr. 96) The day after the May 21 election, however, Dudek told employees Henry Huckoby, Chris Sikora, Nobil Hall and Brian Orosz about Stephens offer to buy votes. (Tr. 96-97)

It is well-settled that an employer's promises of benefits, such as offers of money, violate Section 8(a)(1) when they are timed to affect the election. NLRB v. Exchange Parts Co., 375 NLRB 405 (1964). In Roth IGA Foodliner, 259 NLRB 132 (1980), the Board found that an employer violates Section 8(a)(1) by bribing its employees with promissory notes to vote against the union in an NLRB election. Here, during the critical period, Mazzeo was told by Dudek that Stephen would pay employees for their vote. Again, as with the threats of plant closure and job loss, Stephen's name accompanied the promise to pay for votes.

Further, employees were told about Stephen's offers to pay for votes immediately after the May 21 election. Such statements dissuade employees from continued support for the Union,

particularly while election objections are pending, and make a fair re-run election impossible. In Dlubak Corp., 307 NLRB 1138, 1160 (1992), the Board found that the granting of bonuses after a union election was unlawful where it was designed to interfere with employees' Section 7 rights. The Board has found that bribery of employees to vote against a union in an election, accompanied by unlawful interrogation, threats of discharge and the promise of increased post-election benefits warrants the issuance of a *Gissel* bargaining order. Roth IGA Foodliner, *supra.* at 134.

Counsel for the General Counsel urges the ALJ to sustain Objection No. 3 and to conclude that Respondent violated Section 8(a)(1) by promising to pay employees in the form of attempted bribes for voting against Union.

D. UNLAWFUL INTERROGATION OF AN EMPLOYEE REGARDING HIS VOTING INTENTIONS (COMPLAINT PARAGRAPH NO. 11/OBJECTION NO. 5)

On May 21 before the union election at the Shoreway Lofts jobsite, Dudek asked installer Fred Corbin how he was going vote in the election that day. (Tr. 98) Corbin told Dudek how he would vote. (Tr. 99) Corbin was not a known and open union supporter. (Tr. 99) Dudek's questioning of Corbin's union sympathies followed Respondent's threats and its attempted bribery.

Under Rossmore House, 269 NLRB 1176 (1984), the test for determining whether an interrogation violates the Act is not a *per se* one, but whether under the totality of the circumstances, the interrogation restrains or interferes with rights under the Act. The Board looks to such factors as the background, the nature of the information sought, the identity of the questioner and the place and method of the interrogation. *See, e.g.,* Sunnyvale Medical Center, 277 NLRB 1217 (1985).

Dudek's questioning of an employee as to how he would vote comes in an atmosphere where Respondent had clear union animus as evidenced by the 8(a)(1) misconduct described above. The Board has found that such questioning by a lower level supervisor violates Section 8(a)(1), where it is accompanied by threats of plant closure, job loss and other coercive conduct. *See e.g.*, Elm Hills Meats, 205 NLRB 285, 295 (1973); Bon Appetit Management Co., 334 NLRB 1042, 1044 (2001). Further, a statutory supervisor's questioning about how individual employees intended to vote in a secret ballot elections serves no legitimate purpose where employees are given no assurances against reprisal. Jefferson Smurfit Corp., 325 NLRB 280, 285 (1998). At the time of the interrogation, Dudek had the effective authority to discipline employees and was the immediate supervisor of all of Respondent's installation employees. During Dudek's questioning of Corbin, he gave no assurances to Corbin against reprisal. Finally, the timing of Dudek's questioning on the day of the election is highly coercive.

Based upon the totality of the circumstances, Dudek's questioning of Corbin about how he would cast his vote on the day of the election in an atmosphere mired by other 8(a)(1) conduct, reasonably has a coercive effect, and interfere with employees' union activities and Section 7 rights.

Counsel for the General Counsel urges the ALJ to sustain Objection No. 5 and to conclude that Respondent violated Section 8(a)(1) by unlawfully interrogating Corbin about his voting intentions.

E. UNLAWFULLY INFORMING AN EMPLOYEE THAT SCHEDULED WAGE INCREASES ARE DENIED IN ORDER TO DISCOURAGE EMPLOYEES' UNION ACTIVITIES (COMPLAINT PARAGRAPH NO. 12)

Prior to the filing of the Union's petition, the record shows that Respondent considered giving employees wage increases. Two weeks before the filing of the petition, Stephen, Dudek

and office employee Laurie Stephen discussed a plan to give employees wage increases. (Tr. 335-336; 396) At that time, Stephen "had an idea" of the amount of pay increase he wanted to offer to employees. (Tr. 397-98) For most employees, this scheduled wage increase never came to fruition. During the critical period, employees were not aware of Respondent's plan to change wage rates. (Tr. 178)

On or about May 28, about a week after the election, Stephen told installer James Mazzeo that he was served with the Union's challenge and objections and subpoenaed by the Union top appear at a post-election hearing. (Tr. 175-176) During this conversation, Stephen told Mazzeo that all of the employees were scheduled to get raises and that while a plan was in the works to give employees raises, Stephen was withholding the pay increases because of the Union's post-election challenge and objections and because the election results remain unresolved. (Tr. 177)

An employer must avoid attributing to a union the onus for postponement in wage or benefits adjustments, or disparaging and undermining the union, by creating the impression that the union stands in the way of employees receiving the scheduled wage or benefits increase. Uarco, Inc., 169 NLRB 1153, 1154 (1968) Here, Respondent formed a plan prior to critical period about granting employees wage increases. Stephen's statement to an employee that he was withholding the scheduled wage increases because of the Union's post-election appeal, reasonably creates the impression to employees that the Union was responsible for employees not getting their raises.

In LRM Packaging, 308 NLRB 829, 834 (1992), the Board noted that the test for determining whether statements on the status of wage increases violates the Act is whether the statements were "calculated to impinge upon the employees' freedom of choice in an upcoming or future election." The Board has repeatedly found it unlawful for an employer to explain that

benefits are on hold because of a pending election. *See, e.g.,* Uarco Inc., 216 NLRB 1, 2 (1974); Singer Co., 199 NLRB 1195 (1972). By attributing the delay in granting wage increases to the Union because it filed a post election challenge and objections, Respondent sends a clear message to employees that the Union stands in the way of raises that they were scheduled to receive. Such conduct violates Section 8(a)(1) of the Act.

Counsel for the General Counsel urges the ALJ to find that Respondent violated Section 8(a)(1) of the Act by coercively informing employees that they are denied scheduled pay increases in order to restrain or coerce employees' union support and activities.

F. UNLAWFULLY GRANTING POST-ELECTION WAGE INCREASES TO EMPLOYEES WHILE OBJECTIONS ARE PENDING IN ORDER TO DISCOURAGE EMPLOYEES' UNION SUPPORT (COMPLAINT PARAGRAPH NO. 12)

Despite making statements to employees that scheduled wage increases were on hold because the Union filed a post-election challenge and objections, it is uncontroverted that Respondent also granted pay raises to two employees during the pendency of the election objections. At trial, Stephen admitted that he granted pay increases to installers Fred Corbin and Steve Sarosy while the Union's election objections continue to be pending. (Tr. 402-405)

When an employer announces pay increases while election objections are pending and prior to the issuance of a certification of the election results, it assumes the risk associated with the timing of the raises. Superior Emerald Landpark Landfill, 340 NLRB 449, 462 (2003). Post-election benefits conferred to employees to erode union support in the event of a second election constitute an unfair labor practice. Superior Emerald Landpark Landfill, 340 NLRB 449, 462 (2003) (*citing*, Wis-Pak Foods, Inc., 319 NLRB 933, 939 (1995), *enf'd.* 125 F.3d 518, 525 (7th Cir. 1997) (holding that an employer violates Section 8(a)(1) where an employer grants pay increases to employees at a time when the union objections to a representation election)). Here,

Respondent's issuance of wage increases to employees while objections to the election are pending is reasonably calculated to discourage employees from voting for the Union in a second election if one were ordered. In the eyes of employees, Respondent's conduct effectively diminishes the Union's ability to serve as their collective-bargaining representative. Respondent claims that it granted Corbin and Sarosy the wage increases to Corbin and Sarosy due to its fear that these employees would leave for higher paying jobs. (Tr. 404) However given, Respondent's unlawful threats of plant closure and job loss and attempted bribery of employees to discourage their support for the Union, its issuance of pay increases to two employees was designed to dissuade all of its employees from continuing to support the Union, further bolstering the argument that if ordered, a fair re-run election cannot be held.

Counsel for the General Counsel notes that at present, no complaint allegation exists concerning Respondent's unlawful pay increases to employees and a Motion to Amend Complaint was filed on January 13, 2015 to include this allegation. Even if this Motion is overruled, it is well-settled that the Board may find and remedy a violation in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated. This rule has been applied with particular force where the finding of a violation is established by testimonial admissions of Respondent's own witnesses. Cab Associates, *supra*. at 1398; Pergament United States, Inc., 296 NLRB 333, 334 (1989); Timken Co., 236 NLRB 757 (1978). On this basis, Counsel for the General Counsel respectfully urges Judge Amchan to consider the evidence and find that the Respondent violated Section 8(a)(1) of the Act by granting wage increases to employees in order to discourage union support and activities.

G. RESPONDENT'S UNFAIR LABOR PRACTICE VIOLATIONS ARE SUFFICIENTLY SERIOUS TO RENDER A FAIR ELECTION UNLIKELY

AND A REMEDIAL *GISSEL* BARGAINING ORDER IS NECESSARY (COMPLAINT PARAGRAPH NO. 13)

Relief in the form of a bargaining order is appropriate when an employer commits unfair labor practices so serious that it is all but impossible to hold a fair election even with traditional Board remedies. In NLRB v. Gissel Packing Co., 395 U.S. 575, 611 (1969), the United States Supreme Court stated, "[i]f an employer has succeeded in undermining a union's strength and destroying the laboratory conditions necessary for a fair election…the only fair way to effectuate employee rights is to re-establish the conditions as they existed before the employer's unlawful campaign."

In Gissel, the U.S. Supreme Court identified two categories of cases in which employer misconduct warrants the imposition of a card-based bargaining order remedy. *Id.* at 610. Category I cases involve outrageous and pervasive unfair labor practices that make a fair election impossible, and Category II cases involve less extraordinary and less pervasive unfair labor practices, but which nonetheless have a tendency to undermine majority union support, once expressed through authorization cards, and render the possibility of a fair election slight. *Id*. at 614; Stevens Creek Chrysler Dodge, 357 NLRB No. 57 *slip. op.* at 8 (Aug. 25, 2011); California Gas Transport, 347 NLRB 1314, 1323 (2006). The instant case falls into a Category II type *Gissel* case.

In a Category II type *Gissel* case, the Union must demonstrate that it obtained authorization cards from a majority of employees in an appropriate bargaining unit without misrepresentation, and that it requested recognition and bargaining from the Employer. Phillips Industries, Inc., 295 NLRB 717, fn 10 (1989). At the time the Union requested recognition on April 21, it had seven signed authorization cards from the eight employees in the bargaining unit.

There is no credible evidence to show that any of these cards are tainted or were obtained through misrepresentation.

In Category II type *Gissel* case, an employer's misconduct is sufficiently serious that it will have a tendency to undermine the union's majority strength and make a fair election unlikely. In such cases, the Board considers the following factors in determining whether to impose a *Gissel* bargaining order remedy: (1) the presence of hallmark violations, (2) the extent of the dissemination among employees, (2) the number of employees affected by the violations, (3) the size of the unit, (4) direct evidence of impact of the violations on the union's majority, (6) the identity of the perpetrator of the unfair labor practice, and, (7) the likelihood the violations will recur. *See, e.g.*, Steven Creek, supra. at 8.; Abramson, LLC, 345 NLRB 171, 176 (2005); Garvey Marine, Inc., 328 NLRB 991, 993 (1999).

There is ample evidence that the Respondent committed violations of the Act during and after the critical period which are highly coercive of employees' Section 7 rights. These "hallmark" violations will support the issuance of a *Gissel* bargaining order in the absence of some significant mitigating circumstance. Garvey Marine, Inc., 328 NLRB 991 (1999). Hallmark violations include threats of plant closure, threats of jobs loss and the granting of significant benefits to employees.

The record clearly demonstrates that during the critical period, the Respondent committed multiple threats of plant closure and job loss to discourage employees' union support and activities. In Gissel, the Supreme Court noted that threats of plant closure are demonstrably "more effective to destroy election conditions for a longer period of time than others." Gissel, *supra.* at 611, n. 31. Repeated plant closure threats and threats of discharge alone have been

found to warrant a remedial bargaining order. NLRB v. The Sinclair Glass Co., 397 F.2d 157 (1st Cir. 1968), *affd.* in Gissel, *supra.* at 615; Bi Lo, 303 NLRB 749 (1991).

The record further demonstrates that the Respondent promised not insignificant monetary benefits in exchange for employees' votes before and after the election and granted post-election wage increases to employees in an effort to dissuade employees' union activities and future union support. The Board has noted that unlawfully granted benefits "are particularly lasting in their effect on employees and difficult to remedy by traditional means . . . not only because of their significance to the employees, but also because the Board's traditional remedies do not require the Respondent to withdraw the benefits from the employees." America's Best Quality Coatings Corp., 313 NLRB 470, 472 (1993), *enf'd.* 44 F.3d 516 (7th Cir.), *cert. denied* 515 U.S. 1158 (1995). Not only did Respondent's unfair labor practices during the critical period dissipate employees' majority support for the Union, but its misconduct after the election continues to dampen employees' enthusiasm for union activity.

The dissemination of Respondent's threats of plant closure and job loss is widespread. Jimmy-Richards, Co., 210 NLRB 801, fn 19 (1974) (stating, "widespread dissemination of the threat of plant closure would clearly support a bargaining order.") Dudek testified that he ensured that during the critical period at least 80% of the bargaining unit was aware of Respondent's threats of plant closure and job loss if employees voted in the Union. (Tr. 93) Dudek's testimony was corroborated by four current employees, who comprise half of the unit. Stephen, Respondent's high ranking official, directed Dudek to make these threats and when conveying the threats, Dudek specifically attributed them to Stephen. The Board has warranted *Gissel* bargaining orders in circumstances where hallmark violations are committed only by first-line supervisors. The Board noted that "the words and actions of immediate supervisors may in

some circumstances leave the strongest impression." Garvey Marine, 328 NLRB 991, 993 (1999). In C&T Manufacturing Co., 233 NLRB 1430 (1977), the Board found a remedial bargaining order was warranted where a first line supervisor in a unit of 50 employees told the employees that the owner would shut the place down rather than have a union in the plant. As noted above, unlawful threats, accompanied by the use company officials' names are considered to be as coercive as if the threats came from the company official themselves and are construed as if the threat were spoken directly by higher management officials. *Id.* at 1430.

The severity and lasting coercive effect of Respondent's hallmark violations is magnified by the fact that the bargaining unit has only eight employees. The probable impact of the unfair labor practices is heightened in a relatively small unit and increases the need for a bargaining order. Stevens Creek Chrysler Dodge, *supra.* at 9; Michael's Painting, 337 NLRB 860 (2002); National Steel Company, 344 NLRB 973 (1995).

The impact of Respondent's unlawful conduct is manifested in the election results. At the time of the petition filing, the Union had the support of seven employees. After multiple threats of plant closure and job loss and unlawful promises to employees to pay for their votes which occurred during the critical period, the Union lost the election. These hallmark violations are exacerbated by the fact that the margin of the Union's loss was one vote.

Respondent may contend that Dudek was responsible for the threats and bribes and a bargaining order is not warranted because Dudek has since resigned his employment. This argument must be rejected. It is well-settled that the propriety of a bargaining order depends on the circumstances existing at the time the unfair labor practices were committed and is not affected by subsequent events. Skyline Distributors, 319 NLRB 270 (1995). Even assuming that Dudek's resignation is probative, a bargaining order is warranted because while Dudek was the

mouthpiece, the messages came from Stephen. Stephen, who authorized and directed Dudek to make the threats, continues to work at Respondent's facility. Those threats, together with Stephen's continued presence, have a lasting impact which is unaffected by Dudek's resignation.

Based upon the foregoing, the possibility of erasing the effects of the Respondent's unfair labor practices and ensuring a fair election by the use of traditional remedies is slight. Requiring the Respondent to refrain from unlawful conduct in the future and to post a notice, although remedially necessary, is insufficient to dispel the coercive atmosphere that Respondent created and continues to maintain. The Board stated that, "the *Gissel* opinion itself reflects a careful balancing of the employees' Section 7 rights 'to bargain collectively' and 'to refrain from' such activity." Mercedes Benz of Orland Park, 333 NLRB 1017, 1019 (2001).

Counsel for the General Counsel urges this ALJ to conclude that the rights of the Respondent's employees favoring unionization, which were expressed through authorization cards, can most appropriately be protected by a bargaining order.

IV. CONCLUSION

On the basis of the entire record, particularly the facts referred to above, and the applicable law, Counsel for the General Counsel requests the ALJ find that pending objections that the Union filed in Case 08-RC-127213 are sustained and further conclude that the violated Sections 8(a)(1) of the Act as set forth in the Complaint and Counsel for the General Counsel's Motion to Amend Complaint. Counsel for the General Counsel respectfully requests that the ALJ find that a remedial bargaining order is warranted in this matter and to order Respondent to recognize and bargain with the Union.

Counsel for the General Counsel further requests that the Administrative Law Judge issue the attached proposed conclusions of law[3] and proposed order and posting of notice to employees.[4]

Dated at Cleveland, Ohio this 13th day of January 2015.

Respectfully submitted,

/s/ Rudra Choudhury

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[3] Attached as Exhibit A
[4] Attached as Exhibit B

PROOF OF SERVICE

A copy of the foregoing Brief of Counsel for the General Counsel was sent this on January 13, 2015, to the following individual by electronic mail and where electronic mail is unknown, by regular mail:

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EXHIBIT A PROPOSED CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By threatening plant closure and job loss, Respondent violated Section 8(a)(1) of the Act.
4. By promising monetary benefits to employees in the form of attempted bribes to vote against the Union, Respondent violated Section 8(a)(1) of the Act.
5. By unlawfully interrogating employees about their union attentions, Respondent violated Section 8(a)(1) of the Act.
6. By informing employees that scheduled wage increases are denied in order to restrain or coerce employees' union activities and support, Respondent violated Section 8(a)(1) of the Act.
7. By granting wage increases to employees in order to in order to restrain or coerce employees' union activities and support, Respondent violated Section 8(a)(1) of the Act.
8. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

EXHIBIT B

PROPOSED ORDER AND PROPOSED POSTING OF NOTICE TO EMPLOYEES

The Respondent, Ace Heating & Air Conditioning Co., Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening of plant closure and job loss for employees because of their support of the Union.

(b) Promising monetary benefits to employees in the form of attempted bribes to vote against the Union.

(c) Interrogating employees about their union activities and sympathies.

(d) Informing employees that wage increases are denied because of their union support and activities.

(e) Granting wage increases to employees in order to dissuade them from supporting the Union.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Recognize and bargain with the Union as the exclusive bargaining representative of the employees in the following unit, and during the interim period and execute any agreements that are reached by the parties:

> All full time field installers and service technicians employed at the Employer's facility located at 1500 Brookpark Road, Cleveland, Ohio, but excluding all sales staff, office clerical

employees, professional employees, guards and supervisors as defined by the National Labor Relations Act.

(b) Prepare written bargaining progress reports every 15 days and submit such reports to the Regional Director for the Board for Region 8. Such bargaining progress reports shall include updates on the status of collective-bargaining between the Respondent and the Union, information on the dates and times upon which bargaining sessions took place and interparty communications concerning collective-bargaining. The Respondent shall also serve the reports upon the Union and provide the Union with an opportunity to reply;

(c) Permit the Union reasonable access to the Respondent's facility;

(d) At a meeting or meetings scheduled to ensure the widest possible attendance, have Respondent's representative read the Board's Order to the employees on work time and in the presence of a Board agent;

(e) Post the Board's Order at all bulletin boards and all places where notices to employees are customarily posted.

(f) Cease and desist from interfering with, restraining, coercing, threatening, retaliating against and interrogating employees because of the exercise of their Section 7 rights.

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT raise or promise to raise your wages in order to discourage you from voting for or supporting a union.

WE WILL NOT offer to pay or pay you any money in order to discourage you from voting for or supporting a union or from engaging in union and/or protected concerted activities.

WE WILL NOT ask you if you wish to be represented by a union.

WE WILL NOT threaten that we will close the facility or threaten you with job loss if you choose to be represented by or support a union.

WE WILL NOT fail to recognize and refuse to bargain in good faith with Sheet Metal Workers International Association, Local Union No. 33 for a collective-bargaining agreement covering employees in the unit described above.

WE WILL recognize the Sheet Metal Workers International Association, Local Union No. 33 is the employees' representative in dealing with us regarding wages, hours and other working conditions of the employees in the following unit:

> All full-time installers and service technicians employed at the Employer's facility located at 1500 Brookpark Road, Cleveland, Ohio, but excluding all sales staff, office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL, on request, bargain in good faith with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the unit described above.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of your rights under Section 7 of the Act.

ACE HEATING & AIR CONDITIONING CO., INC.
(Employer)

Dated: _____ **By:** _____

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